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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 681

WEYERHAEUSER STEAMSHIP COMPANY,
a Corporation,
Petitioner

vs.

HAROLD YANOW,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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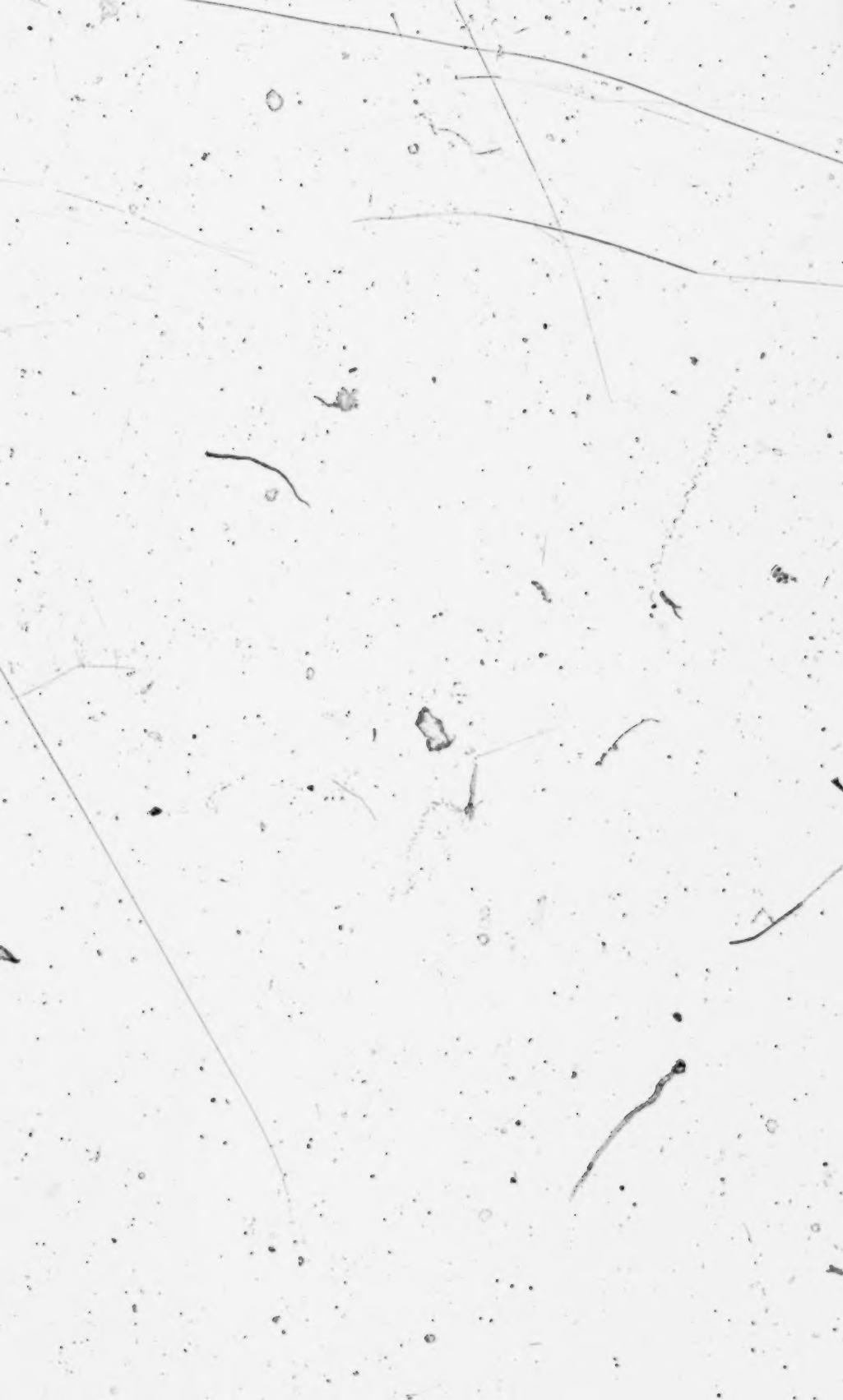

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QUESTIONS PRESENTED

Rule 23 (1) (c) of the rules of this Court provide that the questions presented should be "expressed in the terms and circumstances of the case but without unnecessary detail."

Reference is made to questions A, D and E which are not phrased in terms of the facts of this case but which appear to be purely hypothetical.

STATEMENT OF THE CASE

The jurisdiction of the District Court was based upon a diversity of citizenship and the required amount in controversy.

This action was commenced in the Circuit Court of the State of Oregon and removed by petitioner to the United States District Court for the District of Oregon. On October 25, 1956, the jury returned a verdict in favor of petitioner and against respondent and judgment was entered thereon. On November 5, 1956 respondent moved the District Court for an extension of time in which to file his motion for a new trial and filed in support thereof an affidavit, the full text of which is set forth in the margin of the Court of Appeals' opinion of November 12, 1959 (page 17, appendix, Petition for Certiorari). In this affidavit, attorney for respondent informed the Court that the court reporter was unable to prepare copies of the Court's instructions until November 15, 1956 and that said transcript was essential to the preparation of the motion for a new trial.

On the same day, the District Court entered an order extending the time in which to file the motion for a new trial to and including November 20, 1956 (R. 15).

On November 20, 1956 the respondent served and filed a motion for a new trial challenging, among other things, certain instructions of the Court (R. 15). On December 15, 1956 after argument in which counsel for petitioner participated, the District Court denied the motion for a new trial (R. 17).

On December 19, 1956 respondent filed its notice of appeal and thereafter on November 21, 1957 the Court of Appeals reversed and remanded for a new trial, holding that one of the Court's instructions was erroneous and prejudicial to respondent.

After a petition for rehearing had been filed by petitioner, the Court of Appeals amended its opinion by including therein an excerpt from the verified petition of petitioner showing such diversity of citizenship between the parties as to give the District Court jurisdiction.

In March of 1958 the petitioner filed a petition for writ of certiorari with this Court. This petition was denied on April 28, 1958. *Weyerhaeuser Steamship Company v. Yanow*, 356 US 935.

On May 5, 1958 the Court of Appeals issued its mandate and on October 16, 1958 petitioner served and filed its motion for a recall of said mandate (R. 226). The Court of Appeals on December 17, 1958 denied the motion and petitioner filed a petition for rehearing. This was granted by the court on March 10, 1959 and the matter was heard by the Court of Appeals *en banc* on June 29, 1959.

The court reaffirmed its earlier decision in an opinion dated November 12, 1959.

Thereafter, on February 3, 1960 the petitioner again filed a petition for certiorari.

On page 13 of said petition, petitioner asserts that the matter has not been set for retrial in the District

Court and that the Chief Judge thereof is aware of the pending petition and will take no action unless it is denied.

Respondent has not been advised of any such contact between attorneys for petitioner and the chief judge of the District Court for the District of Oregon. Neither has he been advised that the Court will not reset the case for trial until the petition for certiorari is acted upon. Petitioner believes that the mandate is still on the record of the District Court and that there is no reason why the case should not be set for trial in due course.

ARGUMENT

The burden of petitioner's argument is that the Court of Appeals erred in holding that its motion to recall the mandate was not timely made. We believe that this is a matter within the sound discretion of the Court of Appeals.

The opinion of the court below makes very clear its reasons for holding that the petitioner's motion was not timely. On page 25 of appendix A to the petition, the Court of Appeals in its opinion points out that petitioner delayed filing its motion almost eleven months from the original decision in the case (November 21, 1957 to October 16, 1958) and that during this time it called upon the Court of Appeals to consider the question of jurisdiction of the trial court and that an amended opinion was filed as a result. Petitioner imported a new attorney into the cause and applied for certiorari in this Court and "at all those times counsel must have had occasion to consider,

or have in mind, the basis for jusidiction not only in the court of first instance, but in this Court. It had frequent occasion to sift the record. Seemingly it never occurred to the appellee to present the jurisdictional matter now urged until October 16, 1958. These are among the circumstances which we have in view in holding that more than a reasonable time had elapsed."

The Court of Appeals further carefully considered the merits of petitioner's argument that it had no jurisdiction on the appeal and that its judgment was therefore void. It ruled against petitioner on logical and sound grounds.

Respondent would go further and point out that although the Court of Appeals did not find it necessary to reach this point, it may well have ruled for respondent on the ground that the motion for an extension of time in which to file for a new trial was tantamount to a motion for a new trial itself. Certainly, it could be logically held that the district court had the power to relieve appellant from the running of time in which to file his appeal if one of its own arms, namely the court reporter, was unable to function, and, as in this case, produce a transcript of the instructions as given by the court so that a timely motion for a new trial could be made.

The spirit of the rules of civil procedure does not, it seems to us, impose upon a litigant a penalty for a situation caused by a failure of an employee of the court to perform a ministerial act in a timely fashion.

Counsel has searched diligently for a similar case but is unable to find one which would be of assistance to the Court.

However, counsel for respondent does suggest to the Court that the order of the Court of Appeals denying petitioner's motion to recall its mandate may not be an appealable order under the judiciary act.

As for petitioner's other contentions relative to alleged irregularities of the Court of Appeals, we do not think this is a serious question for the reason that it would seem perfectly appropriate for any court to correct a clerical error as was done in this case. To impute sinister motives to judges and to a Court of Appeals' clerk of long standing is, it seems to us, somewhat far-fetched.

In any case, respondent does not believe that any substantial question affecting the administration of the courts has been raised by the petition for certiorari.

CONCLUSION

Respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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